PETROLIAM NASIONAL BHD. (PETRONAS) & ANOR. v. CHEAH KAM CHIEW

[S.C. (Wan Suleiman, Hashim Yeop A. Sani & Wan Hamzah S.C. JJ. February 25 & May 21, 1986]

[Kuala Lumpur – Supreme Court Civil Appeals Nos. 264 & 265 of 1985]

Practice and Procedure – Costs – Discretion of trial court – Appellate court will not interefere unless there has been an error of law or exercise of discretion wholly unconnected with cause of action – Costs normally follow event unless it appears to court that in the circumstances of the case some other order should be made – R.H.C. 1980, O.59 r. 3(2) – Courts of Judicature Act 1964, s. 68(1)(c).

In this case the respondent who was an account holder of Bank Bumiputra Malaysia Berhad had applied by Originating Summons for declarations that the acquisition of shares in the bank by Petronas was *ultra vires* the Petroleum Development Act, 1978, and so was the purchase or acquisition of the loans of the bank by Petronas. The appellants applied to strike out the Originating Summons on the ground that no reasonable cause of action was disclosed against either of them and that the action was misconceived, frivolous and vexatious as well as an abuse of the process of the court. Before the hearing of the summons of the appellants, the second appellant, the Government of Malaysia, tabled a Bill in Parliament which was later enacted as the Petroleum Development (Amendment) Act, 1985. This Act in effect gave the necessary powers to Petronas and gave them with retrospective effect. The result was that when the Summons in Chambers to strike out the Originating Summons was heard the respondent could no longer dispute that he had no cause of action. The learned trial judge struck out the Originating Summons but awarded costs to the respondent. The appellants appealed.

Held: (1) the general principle envisaged in the Rules of the High Court is simply that costs follow the event and that the successful party is entitled to be paid his costs except when it appears to the court that in the circumstances of the case some other order should be made;

(2) an appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action;

(3) in this case the appellate court could not say that the learned judge had exercised his discretion wrongly in the circumstances of the case.

Cases referred to:

(1) *Ottway* v. *Jones* [1955] 2 All E.R. 585, 591.
(2) *Donald Campbell & Co. Ltd.* v. *Pollak* [1927] A.C. 732.
(3) *Civil Service Co-operative Society* v. *General Steam Navigation Co.* [1903] 2 K.B. 756, 765.
(4) *K. E. Hilborne* v. *Tan Tiang Quee* [1972] 2 M.L.J. 94, 99.

SUPREME COURT.

Dato Peter Mooney (*Zainudin Haji Ismail* and *Mrs. N. Segara* with him) for the 1st appellant.

Suriyadi Halim Omar (Senior Federal Counsel) *Muniandy Kannyappan* (Federal Counsel) with him for the 2nd appellant.

Raja Abdul Aziz Addruse (*William Leong* with him) for the respondent.

Cur. Adv. Vult.

Hashim Yeop A. Sani S.C.J. (delivering the Judgment of the Court): This was an appeal against the award of costs by Harun J. in Originating Summons No. A254 of 1984. We dismissed the appeal with costs and we now give our reasons.

The events leading to this appeal may be summarised as follows. On December 8, 1984 the respondent took out an Originating Summons No. A254 of 1984 against both the appellants as defendants. In the Originating Summons a number of declarations were sought for, the main ones being –

(1) a declaration that the acquisition of shares in Bank Bumiputra Malaysia Berhad by Petronas is *ultra vires* the Petroleum Development Act, 1974;

(2) a declaration that the purchase or acquisition of $2.488 billion "problem loans" of Bank Bumiputra Malaysia Berhad by Petronas is *ultra vires* the Petroleum Development Act, 1974.

The backdrop of the Originating Summons is an episode in the banking history of this country popularly described as the "BMF scandal". In order to rescue the Bank concerned from getting into a crisis due to bad loans the Petroliam Nasional Berhad (PETRONAS in short) acquired a majority share holding in the Bank. The respondent, exercising what he considered as his right as an account holder in the Bank as well as a citizen of this country, took out the Originating Summons to challenge the legality of the acquisition of the shares of the Bank by PETRONAS. Soon after the Originating Summons was served on the appellants both the appellants took out summons-in-chambers on December 29, 1984 to strike out the Originating Summons. The grounds relied on by

both appellants were substantially identical namely that the Originating Summons and supporting affidavit disclosed no reasonable cause of action against either of them and that the action was misconceived, frivolous and vexatious as well as an abuse of the process of the court.

For all intents and purposes PETRONAS is a government corporation established under the Petroleum Development Act, 1974 and the Companies Act 1965. Some time pending the hearing of the summons-in-chambers to strike out the Originating Summons the second appellant tabled a Bill in Parliament and the Bill was subsequently passed by Parliament as the Petroleum Development (Amendment) Act, 1985. The amending Act of 1985 gave new powers to the corporation and these now powers are described in the new section 3A of the Act as the "power to take over or acquire by agreement, assignment, purchase or by any other means the whole or any part of any commercial undertaking, business or enterprise of whatever form of any person or body of persons (corporate or unincorporate)." Section 4(1) of the amending Act then declares that:

"Every act done or transaction carried out by PETRONAS before the enactment of this Act that would have been lawful if this Act had been enacted and in force when such act was done or transaction was carried out is hereby declared to be and always to have been lawfully done or carried out by PETRONAS, and such act or transaction may be continued and dealt with under the principal Act as amended by this Act."

The amending Act 1985 was made retrospective to have effect from October 1, 1974 *i.e.* from the date when the parent Act first came into force.

So when the summons-in-chambers to strike out the Originating Summons came to be heard on July 22, 1985 the respondent could no longer dispute that he had no cause of action and the whole proceeding before the learned Judge dwelt only on the question of costs.

In our law the discretion of the court in matter of costs is clearly spelt out. In the Courts of Judicature Act 1964 section 68(1) (c) puts in no uncertain terms that no appeal should be brought to the Supreme Court where the judgment or order relates to costs only, *"which by law are left to the discretion of the Court,"* except with the leave of the Supreme Court or the Judge concerned. Order 59 rule 3(2) of the Rules of the High Court 1980 provides as follows:

"If the Court in the exercise of its discretion sees fit to make any order as to the costs of or incidental to any proceedings, the Court shall, subject to this Order, order the costs to follow the event, except when it appears to the Court that in the circumstances of the case some other order should be made as to the whole or any part of the costs."

This provision is identical to the English Order 62 rule 3. (See *Supreme Court Practice* 1979 Volume 1 page 959.)

The general principle envisaged in the rule is simply that costs follow the event and that the successful party is entitled to be paid his costs *except when it appears to the Court that in the circumstances of the case some other order should be made.* The same principle was enunciated in greater detail by Parker L.J. in *Ottway* v. *Jones*[1]:

"One starts with this, that, as a general principle, costs follow the event, and the successful party is entitled to be paid his costs unless there are special grounds to order otherwise, and those grounds, it is well settled, must be grounds connected with the cause of action. No doubt, also, where a plaintiff has wholly failed to establish his title or his right, it is impossible judicially to order the sucessful defendant to pay the plaintiff's costs. Indeed, as is shown by the cases to which my Lord has referred, it is there said that the occasion for the exercise of the discretion does not arise until the plaintiff has established his right."

Because costs is in the discretion of the court there has been a rule of practice of the House of Lords as stated by Viscount Cave L.C. in *Donald Campbell & Co. Ltd.* v. *Pollak*[2] that no appeal would lie for costs only but the House will however entertain an appeal from an order of the Court of Appeal as to costs, where it is alleged that the order is founded upon an error of law.

To summarise, an appellate court does not interfere in the question of costs without reluctance. This is because the court below has an absolute discretion except that the discretion must be exercised judicially. An appellate court should not interfere unless it can be shown that there has been an error of law or the purported exercise of discretion was based on grounds wholly unconnected with the cause of action.

The main thrust of the argument of the appellants would seem to be that there was a total failure on the part of the respondent to establish his title and therefore it would be impossible for the court to order costs against the appellants. This argument does not however give a correct picture of the situation before the learned judge. The respondent was an account holder with the Bank and he thought he had sufficient interest to come

to the court and apply for the declarations. What actually happened was not that there was a failure on his part to establish his title but that the government had successfully taken a Bill through Parliament which altered the very basis on which he relied for his application for the declarations.

It was said by counsel for the first appellant that the learned judge had made the remark "this is not cricket" during the argument before him. We feel that the remark if made would be hardly surprising. The circumstances were materials available to the learned judge. Thus as an appellate court we are unable to say that the learned judge had under the circumstances exercised his discretion wrongly. Lord Halsbury in *Civil Service Co-operative Society* v. *General Steam Navigation Co.*[3] said:

"No doubt, where a judge has exercised his discretion upon certain materials which are before him, it may not be, and I think is not, within the power of the Court of Appeal to overrule that exercise of discretion. But the necessary hypothesis of the existence of materials upon which the discretion can be exercised must be satisfied."

The White Book says at page 938:

"On an appeal as to costs where the costs are in the discretion of the Judge the C.A. will assume that he exercised his discretion unless satisfied that he did not do so (*Re Rotch* (1909), 54 S.J. 30). A fortiori it will not interfere where he assigns reasons therefor which are perfectly germane and not based on any false principle (*Lever Bros.* v. *Masboro' Equitable, etc., Society* (1912), 28 T.L.R. 294); nor where there are also other possible grounds for his discretion (*Societe des Hotels Reunis* v. *Hawker* (1914), 30 T.L.R. 423, C.A.).

Wee Chong Jin C.J. in *K.E. Hilborne* v. *Tan Tiang Quee*[4] said:

"It has long been well settled that costs are in the discretion of the court. It has also long been well settled that an appellate tribunal is not entitled to interfere with a discretion exercised by a lower court unless it is clearly shown that the discretion has been exercised on wrong principles. It has also long been well settled that in the exercise of its discretion a court may, if in its opinion there are grounds for it to do so, refuse to award costs to a party who establishes that he has a good cause of action."

The appeal was accordingly dismissed but we directed that the reference to *"Bullock order"* in the order of the judge be deleted.

Appeal dismissed.

Solicitors: *Tunku Zuhri, Manan & Abdullah; Sri Ram, Zulkifly & Kumar.*

OSMAN BIN ABDUL GHANI & ORS. v. UNITED ASIAN BANK BHD.

[S.C. (Lee Hun Hoe C.J. (Borneo), Seah & Hashim Yeop A. Sani S.C.JJ.) October 29, 1985 & May 28, 1986]

[Kuala Lumpur – Supreme Court Civil Appeals Nos. 96, 106 and 123 of 1985]

Contract – Guarantee – Consideration – Forbearance to sue – Evidence.

Banking – Guarantee – Overdraft facilities – Request for forbearance – Whether consideration.

The appellants in this case, save the 6th appellants, were directors of a company. In May 1975 the company through the second appellant as the Managing Director applied to the respondent, a bank, for overdraft facilities. These were granted to the company. The company executed a debenture in the sum of $430,000.00. The 1st, 2nd and 6th appellants executed a guarantee in the sum of $430,000.00.

Subsequently two years after the execution of the first guarantee, the company executed a further debenture in the sum of $1 million. All the appellants executed a guarantee for the same amount. The respondent claimed on the second guarantee. The question in issue was whether there was a valid consideration for the guarantee. The learned trial judge held that there was valid consideration for the guarantee given by the appellants, as he held that there was a request for forbearance to sue and there was forbearance in fact. The appellants appealed.

Held, (Seah S.C.J. dissenting): the learned trial judge was entitled to hold that forbearance could be inferred from the surrounding circumstances in this case and that there was therefore consideration for the guarantee. On the evidence he was not wrong to come to the conclusion which he did.

Cases referred to:

(1) *Miles* v. *New Zealand Alford Estate Company* (1886) 32 Ch. D. 266, 291.
(2) *Crears* v. *Hunter* (1887) 19 Q.B.D. 341.
(3) *Wigan* v. *English & Scottish Law Life Assurance Association* [1909] 1 Ch. D. 291, 297.
(4) *Glegg* v. *Bromley* [1912] 3 K.B. 474, 479.
(5) *Alliance Bank* v. *Broom* (1864) 62 E.R. 631.
(6) *Fullerton* v. *Provincial Bank of Ireland* [1903] A.C. 309.
(7) *Heffield* v. *Meadows* (1869) L.R. 4 C.P. 595.
(8) *Lloyds* v. *Harper* (1880) 16 Ch. D. 290, 303.
(9) *Montgomerie & Co. Ltd.* v. *Wallace-James* [1904] A.C. 73, 75.
(10) *Benmax* v. *Austin Motor Co. Ltd.* [1955] A.C. 370, 372.
(11) *Yang Chin Lang* v. *Tan Chong & Sons Motor Co. Ltd.* [1968] 2 M.L.J. 8.
(12) *Oriental Bank of Malaya Ltd.* v. *Subramaniam* [1958] M.L.J. 35.

SUPREME COURT.

V.P. Pradhan for appellants in Appeal No. 96/85.